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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 644

THEODORE J. CHAPIN and ADAM SYDLIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

LOUIS R. BAKER,
403 West Eighth Street,
Los Angeles 14, California,
Counsel for Petitioners Theodore J. Chapin and Adam Sydlik.

GREENBAUM, BAKER & ANCEL,
MARK G. ANCEL,
THOMAS D. GRIFFIN,
Of Counsel.

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To the Honorable Earl Warren, Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Theodore J. Chapin and Adam Sydlik respectfully move this Honorable Court pursuant to Rule 58 of the Supreme Court Rules of Title 28 U. S. C., for a rehearing in the above entitled matter, and to grant a Petition for Writ of Certiorari on the following grounds, to wit:

That petitioners have overlooked presenting a primary point of Federal Law, which is fundamental in the administration of justice, and is of such magnitude that it should be fully presented and determined by this Honorable Court, before their cause becomes final. This point,

which requires plenary consideration by this Honorable Court, in order to establish uniformity of decision on a question of Federal Law, is:

I.

What Is the Employer-Employee Relationship as to a Member of the Armed Forces and the United States Government?

It is respectfully submitted that the determination of this question is the initial step in determining the ultimate question of wheher the Government is liable under the *Federal Tort Claims Act, United States Code, Title 28, Section 1346b, et seq. and United States Code, Title 28, Section 2671 and Section 2674,* for the negligence of a soldier in the factual situation presented to this court. The determination of the employer-employee relationship is a question of Federal Law, and therefore, must, of necessity, be determined before there is an application of the State Law, that is to say:

1. Was the member of the armed forces in the instant case performing a specific duty for his employer, the United States Government?

2. Assuming that the member of the armed forces was performing a specific duty for his employer, under the law of the particular state where the acts allegedly occurred were the acts of the member of the armed forces in the performance of that duty of such a nature that under the state law of the United States would be responsible by reason of the Doctrine of Respondeat Superior?

The question presented has never been determined by this court in the present context and thus the employer-employee relationship of the member of the armed forces and the United States has not been defined correlative with the Federal Tort Claims Act.

Statutes Involved.

The pertinent portions of the statutes involved provide as follows:

(Secs. 1346(b), 2674 and 2671 of Title 28 U. S. C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 983, 982).)

"Section 1346. United States as defendant.

* * * * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

"Section 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

* * * * * * * *

"Section 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * * * * *

"'Employee of the government' include officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States, whether with or without compensation.

"'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

The existing decisions of the Federal Courts are in conflict. The court, by its decision in *Williams v. United States*, 350 U. S. 857, 76 S. Ct. 100, has held that the question of whether the alleged negligent acts by a government employee occurred while the agent was acting within the scope of his office or employment is to be determined by the doctrine of *respondeat superior* of the jurisdiction where the alleged negligent acts occur. This principle, while apparently easy to apply, has given the federal courts no small amount of trouble in its application to military personnel and their relationship to the government. Several cases dealing with the status of a member of the armed forces have caused controversy because of the fact that the *serviceman-government* relationship is an oddity so far as state law is concerned. There would appear to be no question that if a member of the armed forces engaged in activity which has a counterpart in civilian life, the question of whether the act or admission occurred within the scope of the employment of the soldier, could be answered by the application of local law. However, a member of the armed forces not only is an employee as commonly defined, but he also assumes a *twenty-four hour status relationship* to the

Federal government, the counterpart of which is lacking in civilian life. It is in this latter field that the federal courts have had great difficulty in applying local law.

In two recent Circuit Court of Appeals cases, one arising in the Fifth Circuit, *Hinson v. United States*, 257 F. 2d 178 and the other in the 10th Circuit, *United States v. Mraz*, 255 F. 2d 151, the courts have stated that under fact situations identical to those of the instant case, that a serviceman travelling under orders on a permanent change of station was performing a specific duty which had been assigned to him. In the *Hinson* case the court says *"The serviceman involved was performing a specific duty which had been assigned to him—to travel to Fort Sam Houston.* (Emphasis ours.) In executing this order to proceed, he made use of his private automobile with the express authority of the army. In so doing he was not going to work, he was then engaged in the performance of one of the varied duties specifically assigned to him, receiving army pay, subject to military discipline, and not on leave. His only choice was the immaterial one of route and means of travel." In the *Mraz* case, the court states that "The accident occurred while the officer was upon government business in the furtherance of the government's interests."

In the instant case, the serviceman involved, was travelling under substantially identical orders, as were issued in the *Hinson* and *Mraz* cases, the Circuit Court states "The soldier's obligation to hold himself ready for instant obedience to the commands of his superiors is the concern only of the Army and the soldier. This *unique* obligation is totally unrelated to any conduct affecting these appellants (petitioners herein) or others similarly situated. *As an employer,* the army could not direct the manner in which Frehe drove his car, or its mechanical fitness

for the trip." (Emphasis ours.) Further the court states that the army's only concern was that PFC Frehe report for duty at Fort Hood on April 12, 1956; that the mode and manner of travel was purely of his own choosing and for his own benefit; that "Pfc. Frehe's duties were to be performed at his post. At the time of the accident his duties had terminated at Norton Air Force Base and had not yet begun at Fort Hood. Unless a soldier is to be considered peculiarly different from other employees of the government for the purpose of *respondeat superior* the activity of travelling between permanent duty stations is 'merely during employment' and not 'within the scope of the employment.'"

The reasoning of the court below is reminiscent of the language used by the Circuit Court in *Williams v. United States,* 215 F. 2d 800, wherein the court stated "In none of the California cases cited does a court discuss (as indeed it could not) the question of federal liability for the tortious acts of a soldier." And further the court stated "The status of a soldier or sailor in military or naval service is quite different from the status of either an employee serving a private employer or a civilian employee serving the United States, a fact which requires emphasis because of its importance in the case at bar."

Petitioners herein have no quarrel with the law as stated by this court in *Williams v. United States,* 350 U. S. 857, insofar as it relates to the application of the local law of *respondeat superior.* The crux of the problem which has continuously arisen is the difficulty presented to the federal courts in applying a determinative test to situations which have no counterpart under state law. Thus we find the federal courts constantly searching for state law and state cases analogous to the soldier/government situation and squeezing or stretching to adapt these

tests to fit the circumstances. It is submitted that this method of determination has led to confusion in the application of the Federal Tort Claims Act, when military personnel are involved. In other words the federal courts have looked to state law in interpreting "scope of employment" in search of some determinative test to fit the language of the Federal Tort Claims Statute as applied to members of the military described as "Line of duty." (See 28 U. S. C. 2671.)

The Court of Appeals in the present case relied heavily upon a California case, *McVicar v. Union Oil* (1956), 138 Cal. App. 2d 350, 292 P. 2d 48; 258 F. 2d 465. In the *McVicar* case an employee of United Air Lines was transferred from the United facilities at San Francisco to those at Spokane, Washington. Enroute he was involved in an automobile accident. The employee was paid at an hourly rate, therefore he was not being paid for the time spent travelling; additionally, he was travelling on his days off. However, he was at all times an employee of United and carried as such on their payrolls. He was not reimbursed for the expenses of travel, nor did or could, his employer specify any particular mode of transportation; however, there was evidence that the employee could have utilized his employer's transportation services without cost to himself. The First District Court of Appeal of California held that the employee was not acting within the scope of his employment during the time he was travelling from San Francisco to Spokane pursuant to the transfer. The court there reasoned that "The Employer had no right to control or direct (the employee) as to time, route, mode of transportation, or any feature of his going from San Francisco to Spokane. He could have gone in an aeroplane of his employer free of charge. He could have gone by bus, train, motorcycle, automobile

or have flown his own private plane if he had one. He could start when he pleased, stop when he pleased and go by any route that he pleased so long as he arrived in Spokane in time to report for work on December 1. His employer not only had no right to direct him to go by any particular means of transportation but also no right to forbid him to do so. He could have driven a car with faulty or no brakes and his employer had no right to interfere. To put the test of the cited case, if instructions were given, they would not have been obeyed." (*Ibid.*, at 377, 292 P. 2d at 50.) The Circuit Court in the present case after quoting the above statement goes on to state that: "We conclude the basis of the McVicar case to be that the act of travel by the employee is not one subject to the employer's control as a part of the duties the employee was hired to perform. Similarly, the act of a soldier's travel on a permanent change of station is not a part of the duties for which he is engaged. It is conduct the control of which is beyond the terms of the employment relationship."

In relying upon the *McVicar* decision the Circuit Court below selected what it believed to be the most analogous state case pertaining to the law of *respondeat superior*. The inadequacy of using this method of interpreting the language of the Federal Tort Claims Act as it pertains to military personnel, is pointed out when the Circuit Court endeavors to reason around the element of control. It will be noted in the reasoning of the court in the *McVicar* case the court has stated that the employer has no right to control or direct the employee as to the time, route, mode of transportation or any feature of his travel. However, with military personnel *the government has the right to control all aspects of a serviceman's travel and control him as to time, route, mode of transportation*

or all features connected with his travel. (10 *U. S. C.*, Sec. 1363; 37 *U. S. C.*, Sec. 2553; Sec. 4150 *et seq. of the Joint Travel Regulations.*) Confronted by this apparent right to control on the part of the government the Circuit Court below reasons however that "The government's ability to control Pfc. Frehe's movements arose not out of its status as an employer, but by virtue of his military capacity. In our view the necessary elements of control relates to the particular functions for which the employee was hired and cannot be supplied by the *unique military status.*" (Emphasis ours.) The Circuit Court then states: "*As an employer* the army could not direct the manner in which Frehe drove his car or its mechanical fitness for the trip." (Emphasis ours.) As to this last statement the Circuit Court points out in footnote 14, in order to arrive at this conclusion, "to this limited extent finding XIV to the contrary is erroneous."

In the instant case we have a situation where a serviceman was travelling from one military base to a new assignment at another military base under orders similar to those issued to other members in his group, directed to depart on a certain date and to arrive at his new base on or before a certain date, authorized to receive reimbursement for travel expense, in lieu of common carrier to the extent provided by army regulations, to receive his soldier's pay at all times, that he was directly enroute; that his travel was directed as necessary in the military service, that as a member of the armed forces he was subject to the orders and control of his superior officers in the performance of his military duties; that he could have been under applicable travel regulations forbidden to take his private automobile. Stipulations V, VI, VII, VIII, IX, XI, and Findings VI, VII, VIII, IX, X, XI, XII, XIII and XIV. [Stipulations found on R. 32-33.

Findings on R. 25-27.] Thus, it is clear that there is no deviation "frolic and detour", "personal mission", "unauthorized travel", or a case where the serviceman is on leave for his own personal benefit. It is submitted that in the instant case, under the stipulated facts, we have a fact situation where a serviceman was doing exactly what he was *ordered and authorized to do, to wit: Travel from one duty station to a new duty station.* It is incumbent upon this court to decide whether such travel is within his "line of duty". In *Cannon v. United States* (5th Cir.), 243 F. 2d 71 at page 73 the court states "while 'acting in line of duty' 28 U. S. C. A. 2671 is generally equated with traditional notions of scope of employment, the phrase reflects that congress had in mind, and so must we, the special factors characteristic of military activity and discipline."

Thus these petitioners are not seeking a reversal or a reaffirmation of this court's decision in *Williams v. United States* nor do they oppose the application of the California law of *respondeat superior.* What they do seek is a determination by this court as to precisely what is meant by the language of the Federal Tort Claims Act as it pertains to military personnel acting within the line of duty. No state law nor state court is able, nor will they ever be able, to determine the meaning of this language which is inherently federal in scope. (See *Morgan v. Commissioner,* 309 U. S. 78, 80.)

Respectfully submitted,

LOUIS R. BAKER.
Attorney for Petitioners.

GREENBAUM, BAKER & ANCEL,
MARK G. ANCEL,
THOMAS D. GRIFFIN,
Of Counsel.